



**DISTRICT ATTORNEY'S OFFICE**  
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December 17, 2018

***Via Email***

Lucas Smolcic Larson  
[62986-49841158@requests.muckrock.com](mailto:62986-49841158@requests.muckrock.com)

**Re: Response to Your Right to Know Law Request**

Dear Mr. Larson:

This letter is in response to your Right-to-Know-Law (RTKL) request, which was received by the Open Records Officer of the Philadelphia District Attorney's Office (DAO) on November 2, 2018. You requested:

[1]-a copy of the full text of the memo, should the version attached be incomplete

[2]-Copies of amendments or additions to the memo released to prosecutors between February 15th, 2018 and the date this request is completed

[3]-Written responses (emails, letters, memos) authored by employees of the Office of the District Attorney in response to the memo

[4]-Written requests from Assistant District Attorneys to their unit supervisors requesting "supervisory approval" to break with the terms of the policies outlined in the memo (this process is outlined at the top of the attached copy of the Feb. 15th memo) sent between February 15th, 2018 and the date this request is processed (if these requests are exempted from release under PA's Right to Know Act, I request that a figure for the number of such requests received by unit supervisors in the time frame specified be provided instead)

On November 9, 2018, the DAO invoked its right to a thirty-day extension of time pursuant to RTKL Section 902 until December 10, 2018, to respond. *See* 65 P.S. § 67.902(a)(3) (bona fide staffing limitations); *id.* (a)(4) (legal review necessary); *id.* (a)(7) (extent or nature of request). On that date, the DAO requested a further extension of seven days, until **December 17, 2018**, to respond, which you granted. This constitutes the DAO's final response to your request.

*The DAO does not have responsive records as to requests 1 and 2.*

The DAO does not have a different, amended, or supplemental version of the memo you attached to your request. Accordingly, it does not have any responsive records as to your first and second requests. *See* 65 P.S. § 67.901 (“[A]n agency shall make a good faith effort to determine if the record requested is a public record, legislative record or financial record and whether the agency has possession, custody or control of the identified record . . .”). It is not a denial of access under the RTKL if the requested records do not exist in the agency’s possession, custody, or control. *See, e.g., Moore v. Office of Open Records*, 992 A.2d 907, 909 (Pa. Commw. 2010) (explaining that “[agency] cannot grant access to a record that does not exist”).

*Request 3 is denied.*

Your third request is too broad and ambiguous to satisfy the RTKL’s specificity criteria. Section 703 of the RTKL requires that requests “identify or describe the records sought with sufficient specificity to enable the agency to ascertain which records are being requested.” 65 P.S. § 67.703. Specificity requires a case-by-case balancing of a number of considerations, which include but are not limited to “examining the extent to which the request sets forth (1) the subject matter of the request; (2) the scope of documents sought; and (3) the timeframe for which records are sought.” *Pennsylvania Dep’t of Educ. v. Pittsburgh Post-Gazette*, 119 A.3d 1121, 1124 (Pa. Commw. 2015). Under this standard, your request is insufficiently specific.

In the first place, it is not clear what you mean by a “response” to the February 15th memorandum. That memorandum was a declarative document that spoke for itself and neither required nor solicited any answer. *See* 65 P.S. § 67.703 (“A written request should identify or describe the records sought with sufficient specificity to enable the agency to ascertain which records are being requested....”); *see, e.g., City of Harrisburg v. Prince*, 186 A.3d 544, 559 (Pa. Commw. 2018) (request insufficiently specific where it sought “[a]ny other record in any way relating to the current litigation specified above” (emphasis added)), *appeal granted*, No. 388 MAL 2018, 2018 WL 6070017 (Pa. Nov. 20, 2018); *Pennsylvania Hous. Finance Agency v. Ali*, 43 A.3d 532, 534 (Pa. Commw. 2012) (finding request insufficiently specific where “subject to multiple interpretations”); *id.* at 535 (“[T]he requests for ‘all correspondence ... concerning’ the restructuring of the Tasker Village Mortgage and the Chestnut/56th Street Apartment’s workout project ‘and/or distributed to the Board’ were insufficiently specific for [the agency] to respond to the requests.”) (emphasis added); *Montgomery Cnty. v. Iverson*, 50 A.3d 281, 284 (Pa. Commw. 2012) (finding request insufficiently specific in part because subject-matter was “incredibly broad”); *Brown v. Pine Grove Twp.*, AP 2015-1863 (Pa. OOR Oct. 13, 2015) (“The Request is ambiguous on its face if it is susceptible to two different meanings and the necessary clarity for providing responsive records is absent.”).<sup>1</sup>

Further, you do not identify any specific DAO employees or cases whose records you are requesting. You also do not identify a specific timeframe. And your request is unduly burdensome,

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<sup>1</sup> If you are seeking DAO employees’ written expressions of their personal opinions about the contents of the memorandum, such writings would not constitute public records. *See Pennsylvania Office of Atty. Gen. v. Philadelphia Inquirer*, 127 A.3d 57, 64 (Pa. Commw. 2015) (en banc) (holding that personal email of public employees are not “public” or “records” even if government email used); *Pennsylvania Office of Atty. Gen. v. Bumsted*, 134 A.3d 1204, 1209 (Pa. Commw. 2016) (likewise); *see also* 65 P.S. § 67.708(b)(17)(vi)(C) (“unwarranted invasion of privacy”).

which is a factor considered in the balance. *See Pennsylvania Office of Inspector Gen. v. Brown*, 152 A.3d 369, 373 (Pa. Commw. 2016) (“The fact that a request is burdensome does not deem it overbroad, although it may be considered a factor in such a determination.”). For all those reasons, your request is insufficiently specific.

*Request 4 is denied.*

The records you seek in your fourth request are “criminal investigative records” under Section 708(b)(16) of the RTKL, which creates an exemption from access for any records “relating to or resulting in a criminal investigation.” 65 P.S. § 67.708(b)(16). *See Barros v. Martin*, 92 A.3d 1243, 1250 (Pa. Commw. 2014) (“[I]f a record, on its face, relates to a criminal investigation, it is exempt under the RTKL pursuant to Section 708(b)(16)(ii).”). That exemption remains during and after any investigation is completed. *See Coley v. Philadelphia Dist. Attorney’s Office*, 77 A.3d 694, 697 (Pa. Commw. 2013) (“[C]riminal investigative records are still exempt from disclosure under the Right-to-Know Law after the investigation is completed[.]”); *Pennsylvania State Police v. Office of Open Records*, 5 A.3d 473, 479 (Pa. Commw. 2010) (en banc) (holding that criminal-investigative-record exemption of RTKL exempts records of “whether certain investigative tasks have been carried out or whether certain information was discovered”).

The requested records are also exempt from access under several of the expressly enumerated exemptions of 708(b)(16), including 708(b)(16)(i) (“[c]omplaints of potential criminal conduct”), 708 (b)(16)(ii) (“[i]nvestigative materials, notes, correspondence, videos and reports”); and 708(b)(16)(vi)(A) (“[r]eveal the institution, progress or result of a criminal investigation, except the filing of criminal charges”). In addition, the records are exempt because they “include[] information made confidential by law.” *Id.* (b)(16)(iv); *see Heavens v. Pennsylvania Dep’t of Env’tl. Prot.*, 65 A.3d 1069, 1077 (Pa. Commw. 2013) (“The work-product doctrine offers broad protection to the mental impressions, theories, notes, strategies, research and the like created by an attorney in the course of his or her professional duties, particularly in anticipation or prevention of litigation.”); *Carey v. Pennsylvania Dep’t of Corr.*, 61 A.3d 367, 379 (Pa. Commw. 2013) (explaining that deliberative-process privilege protects information that “reflects or shows the deliberative process in which an agency engages during its decision-making”); *see also* 65 P.S. § 67.708(b)(6)(i)(A)-(C) (“personal identification information” of law enforcement officers).

Further, the Criminal History Record Information Act (CHRIA), 18 Pa.C.S. §§ 9101-9106, prohibits the DAO from releasing “investigative information,” which is defined in Section 9102 of CHRIA to include “[i]nformation assembled as a result of the performance of any inquiry, formal or informal, into a criminal incident or an allegation of criminal wrongdoing.” Records that cannot be disclosed under CHRIA are also necessarily exempt under the RTKL. *See id.* § 9106(c)(4) (“Investigative and treatment information shall not be disseminated to any department, agency or individual unless the department, agency or individual requesting the information is a criminal justice agency....”); *Coley*, 77 A.3d at 697 (explaining that records barred from disclosure by CHRIA are “by definition” not public records under RTKL (citing 65 P.S. § 67.102)).

Finally, to the extent you request in the alternative that the DAO compile statistics for you, the RTKL expressly states that “an agency shall not be required to create a record which does not currently exist. 65 P.S. § 67.705.

*Appellate Rights*

This letter constitutes the response of the DAO to your RTKL request. Should you wish to contest this decision as to Request 4, any appeal must be filed with the District Attorney's Office Appeals Officer, Brad Paraszcak, Three South Penn Square, Philadelphia, PA 19107, no later than 15 business days from the date of this letter. And, should you wish to contest this decision as to Requests 1-3, an appeal must be filed with the Pennsylvania Office of Open Records, Commonwealth Keystone Building, 400 North Street, 4th Floor, Harrisburg, PA 17120-0225, no later than 15 business days from the date of this letter.

Please feel free to contact me if you have further questions.

Sincerely,

*/s/ Peter Carr*

Assistant District Attorney

*/s/ Douglas Weck*

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